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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yuba)

THE PEOPLE,

Plaintiff and Respondent,

v.

KEVIN MICHAEL DAVIS,

Defendant and Appellant.

C052803

(Super. Ct. No. CRF03-702)

OPINION ON REMAND FROM THE
CALIFORNIA SUPREME COURT

The California Supreme Court directed us to vacate our decision in this case and to reconsider the cause in light of *People v. Wagner* (2009) 45 Cal.4th 1039 (*Wagner*). The conclusions in our original opinion are in line with *Wagner*. Those conclusions were and still are: (1) the speedy sentencing rights provided by Penal Code section 1381¹ apply to a probation revocation proceeding if imposition of sentence was originally suspended; (2) the trial court should have granted defendant Kevin Michael Davis's section 1381-based motion to dismiss his probation revocation proceeding for failing to sentence him within the 90-day period mandated by that section (and therefore

¹ Undesignated statutory references are to the Penal Code.

that sentence must be vacated); and (3) under section 1387 the People may refile the probation revocation proceeding within defendant's tolled period of probation.

FACTUAL BACKGROUND

On August 25, 2004, pursuant to a plea bargain, defendant pleaded guilty in Yuba County Superior Court case No. CRF03-702 to a single count of violating Health and Safety Code section 11379, subdivision (a) (transporting methamphetamine).

On September 13, 2004, the Yuba County Superior Court suspended the imposition of sentence and placed defendant on probation for three years pursuant to Proposition 36 (drug treatment program).

On October 12, 2004, the Yuba County Probation Office petitioned to revoke defendant's probation because he failed to report to his probation officer on September 16, 2004, as directed; defendant's probation was summarily revoked.

After defendant failed to appear for a Yuba County Superior Court proceeding regarding this September 16 probation violation, the probation violation hearing was held on September 26, 2005, and defendant admitted that he failed to report on September 16, 2004. Defendant was ordered to return on October 17, 2005, for judgment and sentencing, but he failed to appear on that date.

On October 21, 2005, defendant was sentenced in Sutter County Superior Court case No. CRF-05-2182 to two years in state prison for violating section 459 (first degree burglary).

Just four days later, on October 25, 2005, at the request of the Yuba County District Attorney, the Yuba County Superior Court issued an order for removal of prisoner. The order specified that a criminal proceeding (case No. CRF03-702) was pending against defendant in the Yuba County Superior Court, and that defendant was to be brought to the Yuba court on November 7, 2005, at 9:00 a.m. The minute order for the November 7 proceeding, described as an arraignment for probation violation, states, "Dropped--Active Warrant."

On January 4, 2006, defendant served the Yuba County District Attorney with a preprinted form entitled "NOTICE AND DEMAND FOR TRIAL (P.C. SECTION 1381)." This notice provided the specifics of defendant's Sutter County conviction, stated that defendant had reason to believe that a Yuba County criminal action for violation of probation was pending against him, and demanded a hearing of that criminal action as prescribed by section 1381.

Based on this section 1381 demand, defendant, on April 4, 2006, moved to dismiss his Yuba County case (case No. CRF03-702; transporting methamphetamine) because he had not been heard within the 90-day period mandated by that section.

On May 26, 2006, the Yuba County Superior Court implicitly denied defendant's section 1381-based motion, finding the

section inapplicable to an incarcerated probationer with a pending probation revocation proceeding. The Yuba court then sentenced defendant on his Yuba County conviction (transporting methamphetamine) to a one-year sentence consecutive to his two-year sentence on his Sutter County conviction (first degree burglary).

Defendant has timely appealed from this Yuba County judgment.

DISCUSSION

I. Application of Section 1381

Defendant contends his Yuba County case (transporting methamphetamine) must be dismissed because the Yuba County Superior Court failed to sentence him within 90 days of the district attorney's receipt of his section 1381 demand for hearing regarding his pending probation violation proceeding. We conclude that defendant's Yuba County probation revocation (sentencing) proceeding should have been dismissed, and that the sentence imposed at that proceeding must be vacated.

Section 1381 provides in pertinent part: "Whenever a defendant has been convicted, in any court of this state, of the commission of a felony . . . and has entered upon a term of imprisonment . . . and at the time of the entry upon the term of imprisonment . . . *there is pending*, in any court of this state, any other indictment, information, complaint, or any *criminal proceeding wherein the defendant remains to be sentenced*, the district attorney of the county in which the

matters are pending shall bring the defendant to trial or for sentencing within 90 days after the person shall have delivered to said district attorney written notice of the place of his or her imprisonment . . . and his or her desire to be brought to trial or for sentencing unless a continuance beyond the 90 days is requested or consented to by the person, in open court In the event that the defendant is not brought to trial or for sentencing within the 90 days the court in which the charge or sentencing is pending shall, on motion or suggestion of the district attorney, or of the defendant . . . or his or her counsel, . . . or on its own motion, dismiss the action.” (Italics added.)

In *Wagner*, our state Supreme Court construed the statutory speedy sentencing provisions contained in sections 1381 and 1203.2a as to defendants who are placed on probation with the imposition of sentence suspended for one offense and who, while still on probation, are convicted of an unrelated offense and incarcerated on that offense (such defendants are termed, “incarcerated probationers”). (*Wagner, supra*, 45 Cal.4th at pp. 1045-1046.)²

² As to incarcerated probationers, section 1203.2a provides that the court that granted probation “shall have jurisdiction [for 30 days] to impose [the suspended] sentence” following the probationer’s request under section 1203.2a that sentence be imposed “in his or her absence and without him or her being represented by counsel.” (§ 1203.2a, 1st par.; *Wagner, supra*, 45 Cal.4th at p. 1045.)

Wagner concluded, as pertinent here, that incarcerated probationers may request speedy sentencing under *either* section 1381 or section 1203.2a. (*Wagner, supra*, 45 Cal.4th at p. 1046.) In determining that section 1381 applies to incarcerated probationers too, the *Wagner* court noted that “[b]y its plain language,” section 1381 “applies to any pending ‘criminal proceeding wherein the defendant remains to be sentenced.’ . . . We see no reason not to give effect to this plain language.” (*Id.* at p. 1055; § 1381.) *Wagner* additionally concluded that when a trial court fails to comply with the 90-day time requirement of section 1381, the “action” that section 1381 requires be dismissed is the pending action--that is, the pending probation revocation proceeding, not the conviction underlying the original grant of probation. (*Id.* at pp. 1046, 1057-1058.)

We now apply these legal principles to the facts here.

Defendant correctly points out that he was sentenced in his Yuba County probation revocation proceeding on May 26, 2006, well after the 90-day deadline required by his section 1381 hearing demand of January 4, 2006. We conclude that defendant’s section 1381 demand was sufficient to invoke the protections of that section.

As relevant here, section 1381 is invoked when, “at the time of the entry upon the term of imprisonment [here, imprisonment on the Sutter County conviction] . . . there is pending, in any court of this state, . . . any criminal

proceeding wherein the defendant remains to be sentenced [here, the probation violation proceeding in Yuba County]"; if so, "the district attorney of the county in which the matters are pending shall bring the defendant to trial or for sentencing within 90 days after the person shall have delivered to said district attorney written notice of the place of his or her imprisonment . . . and his or her desire to be brought to trial or for sentencing." (§ 1381.)

Defendant's section 1381 demand was dated January 4, 2006, and was drafted on a preprinted form entitled "NOTICE AND DEMAND FOR TRIAL (P.C. SECTION 1381)." The demand stated as pertinent: "TO THE DISTRICT ATTORNEY, Yuba C[ounty], State of California. Please take notice that I, Kevin Michael Davis[,], Inmate # F01909[,], (CDC Number) at Salinas Valley State Prison[,], was convicted of the crime of 1st [d]egree burglary in Sutter County, CA, and was sentenced . . . on or about 10-21-05 . . . to a term of 2 years. I have reason to believe that the following criminal action is now pending against me in Yuba County. CHARGES[:] Violation of Probation[.] WARRANT #[:] BW19670. COURT (Location): 215 5th St. ARRESTING AGENCY[:] Yuba P.D. I HEREBY DEMAND A HEARING AND TRIAL OF SAID CRIMINAL ACTION AS PRESCRIBED BY SECTION 1381 OF THE PENAL CODE OF CALIFORNIA." (Defendant then provided personal information and specified the mailing address for Salinas Valley State Prison.)

To comply with the section 1381 requirements, defendant had to deliver to the Yuba County District Attorney "written

notice of the place of his . . . imprisonment . . . and his . . . desire to be brought . . . for sentencing [regarding the criminal proceeding in which he remained to be sentenced]"

The record shows that defendant met section 1381's notice requirement to the district attorney. Aside from defendant's section 1381 demand itself, which was directed to the Yuba County District Attorney, defendant submitted a declaration accompanying his section 1381 motion to dismiss. That declaration stated: "On 1-4-06[,] I[,] [Kevin Davis,] served a Notice and Demand for Trial, per Penal Code § 1381, on the District Attorney of the County of Yuba by placing a completed Notice and Demand for Trial in the United States Mail system at Salinas Prison in conformance with the prison legal mail mailing procedures, by affixing first class postage to an envelope addressed to the District Attorney. There is regular United States Mail service between Salinas Prison and the address of the District Attorney."

The record also shows that defendant met section 1381's contents requirements by stating his place of imprisonment and his desire to be brought for sentencing.

As for place of imprisonment, defendant's section 1381 demand specified his name, his inmate number, his place of imprisonment, and the particulars of the Sutter County conviction on which he was imprisoned (offense, sentencing date and term).

As for defendant's stated desire to be brought for sentencing, his section 1381 preprinted demand specified as pertinent with the blanks on the form filled in as indicated: "I have reason to believe that the following criminal action is now pending against me in Yuba C[ounty]. CHARGES[:] Violation of Probation[.] WARRANT #[:] BW19670 . . . I HEREBY DEMAND A HEARING AND TRIAL OF SAID CRIMINAL ACTION AS PRESCRIBED BY SECTION 1381 OF THE PENAL CODE OF CALIFORNIA." As noted in the Factual Background part of this opinion, the only act remaining to be done with respect to this "violation of probation" criminal action was to sentence defendant (i.e., the Yuba County probation violation hearing had taken place on September 26, 2005, defendant had admitted the violation, and he was ordered to return on October 17, 2005, for sentencing; but on October 21, 2005, defendant was sentenced on the Sutter County conviction, and his failure to appear in Yuba County on October 17 led to the warrant whose number is specified in defendant's section 1381 demand). As defendant persuasively argues in supplemental briefing we requested, "[s]ince the only hearing pending at the time [defendant] made his [section 1381] demand was the sentencing hearing following the revocation of [defendant's] probation, the 'hearing' [defendant] was seeking was that sentencing hearing. No other reasonable conclusion can be drawn with respect to the meaning of the term 'hearing' in [defendant's] Penal Code section 1381 demand."

Furthermore, as defendant notes in his supplemental brief without challenge, his preprinted section 1381 form was a standard form made available to Salinas Valley prison inmates. In preprinted language, this form allows an inmate to demand only "A HEARING AND TRIAL OF SAID CRIMINAL ACTION AS PRESCRIBED BY SECTION 1381 OF THE PENAL CODE." Section 1381 applies only to a "desire to be brought to *trial*" (relating to any pending "indictment, information, [or] complaint") or for *sentencing* (relating to "any criminal proceeding wherein the defendant remains to be sentenced"). (Italics added.) Applying this language to the facts here, defendant's demand for "A HEARING" could align only with a demand for a sentencing hearing.

We conclude that defendant has strictly complied with the requirements of section 1381, as mandated by *People v. Gutierrez* (1994) 30 Cal.App.4th 105, 111. To conclude otherwise in light of the facts here would be not only inaccurate, but unfair to defendant.

We conclude that defendant's Yuba County probation revocation (sentencing) proceeding should have been dismissed pursuant to his section 1381 motion, and the imposition of sentence at that proceeding must be vacated.

II. Application of Section 1387

Although the Yuba County probation revocation proceeding should have been dismissed and the imposition of sentence at that proceeding must be vacated, a companion statute to section 1381, section 1387--as construed in *Wagner*--allows the

Yuba County District Attorney an opportunity to refile the probation revocation proceeding within defendant's probationary period.³ As *Wagner* stated in this respect: "We agree with the Court of Appeal that section 1387 allows the People 'an opportunity to refile the probation revocation proceeding within defendant's probationary period' after a dismissal of the revocation proceeding under section 1381." (*Wagner, supra*, 45 Cal.4th at p. 1059.)

Section 1387, subdivision (a) states, in pertinent part: "An order terminating an action pursuant to this chapter [which includes section 1381] is a bar to any other prosecution for the same offense if it is a felony . . . and the action has been previously terminated pursuant to this chapter." (Italics added.)

In plain English, this statute gives the prosecutor one opportunity to refile an action that has been dismissed under section 1381, if the charged offense was a felony. *Wagner* interpreted section 1381 as applying to the "action" of a probation revocation proceeding. (*Wagner, supra*, 45 Cal.4th at pp. 1046, 1057-1058.) Consistent with that interpretation, section 1387 applies to a probation revocation proceeding based on a felony charge.

³ In such a situation, if a revocation order and sentence result, we note defendant must receive credit for any time served.

Defendant's probation revocation proceeding (Yuba County) was based in part on a subsequent felony conviction (the Sutter County conviction for first degree burglary), and the record does not indicate that this probation revocation proceeding had ever been dismissed previously. Consequently, section 1387 applies here. (After defendant served his section 1381 demand, the focus of defendant's pending Yuba County probation revocation proceeding--for which only sentencing remained to be done--became defendant's Sutter County conviction and sentence for first degree burglary.)

Defendant had been placed on probation for his Yuba County offense for a period of three years, beginning September 13, 2004. Accordingly, his probation period would normally end on September 13, 2007, unless his probation had been revoked for any period of time, as revocation tolls the running of the probationary period. (§ 1203.2, subd. (a).) Absent any tolling, the People would have lost the opportunity to refile the probation revocation proceeding under section 1387 after September 13, 2007, because a probation revocation order must naturally be made within the probationary period. (See *Wagner*, *supra*, 45 Cal.4th at p. 1060.) The record shows that defendant's probation was revoked summarily on October 12, 2004, and revoked formally on May 26, 2006, when the Yuba court decided not to reinstate probation and to sentence defendant to one year in state prison on the Yuba offense. (*Id.* at pp. 1060-1061.)

Assuming, then, that defendant's probation has remained revoked from October 12, 2004 (i.e., never reinstated), the Yuba County District Attorney will have a tolled period of 35 months remaining on defendant's probationary period (to commence running once there is issuance of the remittitur in this case) in which to refile the probation revocation (sentencing) proceeding, if the District Attorney chooses to do so. (See *Wagner, supra*, 45 Cal.4th at pp. 1060-1062).

DISPOSITION

The Yuba County Superior Court is ordered to (1) dismiss the challenged probation revocation/sentencing proceeding; (2) vacate the sentence imposed at that proceeding; and (3) release defendant from custody on that sentence. Given the assumption noted just above, the Yuba County District Attorney will have a period of 35 months from the issuance of the remittitur in this case to refile the probation revocation (sentencing) proceeding, if the district attorney chooses to do so. If the district attorney does so, it may seek a revocation order and sentence (which accounts for all time served).

BUTZ, J.

We concur:

BLEASE, Acting P. J.

HULL, J.